No. 95-1621

In The

Supreme Court of the United States

October Term, 1996

HARBOR TUG AND BARGE COMPANY, INC.,

Petitioner,

v.

JOHN PAPAI AND JOANNA PAPAI,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INDUSTRIAL INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, EAGLE PACIFIC INSURANCE COMPANY, MATSON NAVIGATION COMPANY AND THE LONGSHORE CLAIMS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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52 pp

QUESTIONS PRESENTED

A. Papai Denied Seaman's Status in his LHWCA Claim, While Harbor Tug Asserted It. After Full Litigation, an ALJ Found Papai Was Not a Seaman, and Awarded LHWCA Benefits. Can Papai Now Relitigate that Same Issue in a Civil Court to Obtain a Different Result?

B. Can the Trier of Fact Consider Work for Different Prior Employers When Determining an Employee's Status as a Seaman with his Current Employer?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai

Defendant/Petitioner:

Harbor Tug and Barge Company

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BRIEF OF INDUSTRIAL INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, EAGLE PACIFIC INSURANCE COMPANY, MATSON NAVIGATION COMPANY AND THE LONGSHORE CLAIMS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

I. INTEREST OF THE AMICI CURIAE

Industrial Indemnity Company, National Union Fire Insurance Company of Pittsburgh, PA, Eagle Pacific Insurance Company, Matson Navigation Company and the Longshore Claims Association respectfully submit this brief *amici curiae* in support of the petitioner Harbor Tug and Barge Co. The consent of the attorneys for petitioner and respondent has been obtained.

Industrial Indemnity Company, National Union Fire Insurance Company of Pittsburgh, PA and Eagle Pacific Insurance Company are major underwriters of employer risk insurance, nationally and in West Coast markets. Among other things, they insure employers for United States Longshore and Harbor Workers' Compensation Act risks, and the various employer risks attendant to the Jones Act and the general maritime law of the United States. These insurance underwriters have a strong interest in promoting the swift, fair, and consistent resolution of employee claims brought against their insured employers.

Matson Navigation Company is an owner and operator of United States flag container ships. It provides liner service between various West Coast ports, Hawaii and certain western Pacific ports. In addition, it operates several container terminals that service its vessels. Matson

employs both traditional seamen and traditional longshoremen. It has both sea-based and land-based employees. Matson has an interest in the operation of any remedial scheme that affects its workforce and its ability to manage, on a cost-effective basis, employee injury claims.

The Longshore Claims Association (LCA) is a national association of individuals and companies involved in the defense of claims under the United States Longshore and Harbor Workers' Compensation Act and related maritime employment law. The LCA promotes expertise in claims administration through continuing education programs. It is a Longshore claims defense advocacy group that supports relevant issues in pending cases. Its membership includes Longshore employers, insurance carriers, risk managers, attorneys and experts in various related fields. The issues presented herein effect its membership.

Amici curiae are all involved in the day-to-day administration of employee injury claims from employees covered by the Longshore and Harbor Workers' Compensation Act. They have an interest in promoting the fair and just handling of these claims and an equally strong interest in avoiding costly multiple litigation of claims. They have an interest in seeing to it that the no fault remedial schemes at issue in this case operate as designed and intended by Congress.

II. SUMMARY OF ARGUMENT

Amici curiae join Harbor Tug and Barge to request reversal of the Ninth Circuit Court of Appeals on two

issues. (A) The Appeals Court erred in refusing to grant collateral estoppel effect to a prior finding in the LHWCA forum. *Amici Curiae* urge this Court to hold that any order awarding benefits under the LHWCA precludes subsequent litigation of a Jones Act claim for the same injury. (B) The Appeals Court erred in creating a new and expanded test for seaman status. *Amici curiae* urge reversal and adoption of a rule that defines the fleet as those vessels in navigation owned or controlled by the Jones Act employer.

A.

In its decision, the Court of Appeals for the Ninth Circuit acknowledges that the Longshore and Harbor Workers' Compensation Act (LHWCA)[1] and the Jones Act[2] are mutually exclusive remedies for injured maritime workers. This concept is, in the wake of recent opinions of this Court, no longer open to challenge. What remains to be identified is the "trigger event", the defining moment when the remedial schemes become mutually exclusive. On a time line, the Ninth Circuit has selected the last possible event, civil trail of the Jones Act case, as the trigger event. This, under the rubric of 'no double recovery', merely pays lip service to the doctrine of mutual exclusivity.

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[1] 33 U.S.C. § 901 et seq., created a workers' compensation system for certain maritime workers, but excluding coverage for seamen.

[2] 46 U.S.C. § 688 is a tort system for compensating injured seamen.

The Court below takes judicial notice of a Decision and Order of an Administrative Law Judge (ALJ) under the LHWCA. The ALJ finds that Papai is not a seaman, and that he is covered by and entitled to benefits under the LHWCA. The Appeals Court notes that the LHWCA claim "was fully litigated". However, the Appeals Court declines to apply collateral estoppel to the LHWCA Decision, and orders that the seaman status issue be submitted to a jury. Should Papai prevail on his claims before a jury, the employer will get a credit for sums received by Papai under the LHWCA. It reaches the conclusion that because there is no double recovery, there is mutual exclusivity.

The Appeals Court then holds that because collateral estoppel's purpose would not be served, it should not be applied. But the Court's reasoning does not support the outcome. It should be reversed.

(1) An Order properly issued under the LHWCA precludes any contrary finding by any civil court. To deny collateral estoppel to administrative orders would cause immense disruption to workers' compensation systems, inflate costs unnecessarily, and increase litigation dramatically.

(2) The Appeals Court construes LHWCA § 3(e)[3] as requiring that the LHWCA and the Jones Act be applied sequentially. The correct function of LHWCA § 3(e) is to grant the LHWCA employer credit for payments voluntarily made under the Jones Act. It should not be applied for the purpose suggested by the Appeals Court.

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[3] 33 U.S.C. § 903(e).

(3) The idea that no harm occurs if there is no double recovery is wrong. An employer faces double costs even if the employee does not make a double recovery. But even if there were not duplicate costs, lack of harm is insufficient to overcome statutory prohibitions. LHWCA §§ 5(a)[4] and 33(i)[5] prohibit the result reached by the Appeals Court.

(4) There was no indication that the seaman status issue was not vigorously litigated in the LHWCA trial. Papai had adequate incentive to argue against seaman status in order to obtain LHWCA benefits. Harbor Tug had adequate incentive to argue for seaman status to avoid LHWCA liability. If it had succeeded in the LHWCA claim, and if the summary dismissal had been sustained, the employer would have avoided liability in both forums.

(5) The Appeals Court says that allowing collateral estoppel for a formal Order would discourage LHWCA settlements. That is an insufficient basis for ignoring well established principals of collateral estoppel and strong statutory language. The Court bases this on its decision in *Figueroa v. Campbell*[6]. But the holding in *Figueroa* should be overruled. Further, application of principles of collateral estoppel reduce, rather than increase, litigation. The

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[4] 33 U.S.C. § 905(a) makes LHWCA benefits the exclusive liability of the employer.

[5] 33 U.S.C. § 933(i) makes LHWCA benefits the employee's exclusive remedy on account of employer fault.

[6] 45 F.3d 311 (9th Cir. 1995), holding that settlement of an LHWCA claim does not preclude subsequent Jones Act litigation.

doctrine of collateral estoppel was developed to prevent multiple litigation of the same issue, the possibility of inconsistent results, and to provide a degree of finality to judicial and quasi-judicial decisions.

(6) The Appeals Court suggests that LHWCA benefits are the functional equivalents of maintenance and cure, and should be merely precursors to more substantial remedies. But LHWCA benefits are only available to non-seamen; they are more varied, greater in scope, and greater in duration; and they are intended as a complete substitute for all tort remedies. Moreover, once Congress has spoken and set forth its policy decisions, the doctrine of judicial restraint should apply, barring constitutional challenge.

B.

The Court below erred when it expanded the "fleet seaman doctrine" to include, within the fleet, all vessels owned by all employers that have a collective bargaining agreement with Papai's labor union. The 'fleet seaman doctrine' applies only to vessels subject to common ownership or control, and that common ownership or control must be that of the Jones Act employer.

III. ARGUMENT

A. Papai Denied Seaman's Status in his LHWCA Claim, While Harbor Tug Asserted It. After Full Litigation, an ALJ Found Papai Was Not a Seaman, and Awarded LHWCA Benefits. Papai Cannot Now Relitigate that Same Issue in a Civil Court to Obtain a Different Result.

In 1927, Congress passed the LHWCA and established an administrative tribunal within the Department

of Labor to hear any claim brought under that Act. It provided that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."[7] In 1972 Congress amended the LHWCA, in part providing that all powers, duties, and responsibilities previously vested in the deputy commissioner would now be vested in administrative law judges, who would hear cases in accordance with provisions of the Administrative Procedures Act, 5 U.S.C. § 554.[8] One of the questions presented in every claim for benefits under the LHWCA is whether the claimant is an "employee" as defined in the Act.[9] The definition includes certain classes of maritime workers, but specifically excludes eight classes of workers,[10] including "a master or member or a crew of any vessel".[11]

Under the doctrine of collateral estoppel, relitigation of issues between the same parties is barred once a judicial entity has decided an issue necessary to its judgment.[12] The doctrine applies to decisions of

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[7] 33 U.S.C. § 919(a).

[8] 33 U.S.C. § 919(d).

[9] 33 U.S.C. § 902(3).

[10] 33 U.S.C. § 902(3)(A)-(H). The excluded workers, in addition to seamen, are generally those involved in clerical, recreational, retail trade, marina operations, supply, delivery, aquaculture, and work on certain classes of small vessels.

[11] 33 U.S.C. § 902(3)(G).

[12] *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

administrative agencies as well as to decisions of Article III courts.[13]

All elements for collateral estoppel are met here. (i) The issue of crew member status under the LHWCA is the same as the issue of seaman status under the Jones Act.[14] (ii) The parties are the same in the LHWCA and the Jones Act proceedings. The injured party is John Papai and the employer is Harbor Tug in both actions. (iii) The ALJ Decision and Order is final. (iv) The Office of ALJ's is an administrative court of competent jurisdiction.[15]

The Appeals Court chose not to honor the ALJ Decision and Order. It found no fault with procedures under the LHWCA claim, the identity of the parties, the identity of the issue, or the finality of the LHWCA Decision and Order.[16] Instead, it chose to substitute its own concept of what the law ought to be for that which this Court and Congress had previously established. The Appeals Court, relying on *Figueroa*[17], concluded that allowing a Decision and Order to collaterally estop subsequent litigation would somehow encourage litigation. Yet the result in this case encourages double litigation, and in fact virtually assures it in a wide range of cases.

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[13] *United States v. Utah Construction and Mining Company*, 384 U.S. 394, 421 (1960).

[14] The term "member of a crew" in the LHWCA is a refinement of the term "seaman" in the Jones Act. *McDermott International, Inc v. Wilander*, 498 U.S. 337 (1991).

[15] 33 U.S.C. §§ 919(a), (d).

[16] In fact, it had no jurisdiction over Papai's LHWCA claim.

[17] *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995).

1. Any Order Awarding Workers' Compensation Benefits Bars Subsequent Jones Act Litigation Because Disregard for the Collateral Estoppel Effect of an LHWCA Decision and Order Will Severely Disturb the Proper Functioning of Workers' Compensation Systems.

There is a dramatic split of opinion between the Fifth Circuit and the Ninth Circuit as to when the issue of seaman status is determined. In *Sharp*[18], the Fifth Circuit held that an order approving an LHWCA settlement necessarily included a finding of non-seaman status. Thus, no further litigation of seaman status could be allowed. In *Figueroa*[19], The Ninth Circuit held that collateral estoppel would only apply after a full evidentiary hearing on the seaman status question. Then the Ninth Circuit in *Papai*[20], held that no LHWCA order would be granted collateral estoppel effect.

The better rule, and that which these *amici curiae* urge, is that any order establishing liability under the LHWCA (or other workers' compensation act that excludes coverage for seamen) bars further seaman's claims for the same injury.

The LHWCA was created by Congress in 1927 to provide a unique workers' compensation scheme for a discrete class of maritime employees who were not subject to state workers' compensation laws and were not

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[18] *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).

[19] *Figueroa v. Campbell*, 45 F.3d 311 (9th. Cir 1995).

[20] *Papai v. Harbor Tug and Barge*, 67 F.3d 203 (9th Cir. 1995).

entitled to traditional seamen's remedies.[21] In creating the Act and delegating the administration and adjudication of claims to the Department of Labor, Congress attempted to balance the conflicting interests of injured maritime employees in need of certainty of recompense and interests of employers in need of economic protection from the cost of maintaining liability insurance.[22]

In a long line of maritime and other cases, this Court has held that a statute "must be read in the light of the mischief to be corrected and the end to be attained."[23] The lower court decision does not further Congress's goal in enacting and amending the LHWCA. It does not eliminate the mischief that the Act was intended to eliminate. And it creates various opportunities for new mischief which these *amici curiae* ask this Court to avoid. The decision below will greatly increase litigation, greatly increase costs, and make a mockery of workers' compensation adjudication across the land.

The problem created by the decision of the Appeals Court is not limited to cases involving crew member

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[21] 33 U.S.C. § 903 (1927); *Southern Pacific Company v. Jensen*, 224 U.S. 205 (1917).

[22] *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

[23] *Warner v. Goldtra*, 293 U.S. 155, 158 (1934), interpreting "seaman" in the Merchant Marine Act; quoted with approval in *South Chicago Coal & Dock Co. v. Bassett (Schumann)*, 309 U.S. 251, 259 (1940), interpreting "crew member" in the LHWCA; *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944), interpreting "employee" in the NLRA; and *McDermott International v. Wilander*, 498 U.S. 337, 349 (1991), referring to this "salutary principal" when interpreting "seaman" in the Jones Act.

versus longshore status. It extends to virtually any workers' compensation claim under any state or federal law anywhere in the land.

All workers' compensation systems have threshold coverage issues. If such issues are not decided in favor of the employee, there is no coverage under the workers' compensation law, and remedies lie elsewhere. In the LHWCA, such threshold issues include employee status, which necessarily entails lack of crew member status. But all workers' compensation systems include threshold issues of whether an injured worker is an "employee" or an "independent contractor", and whether an injury occurred in the course of employment, subject to the workers' compensation scheme, or outside the course of employment, subject to a civil remedy.

If a civil court can go behind a workers' compensation finding on crew member status, it can just as easily go behind a finding on independent contractor or course of employment. Thus a claimant can allege he is in the course of employment or that he is an employee in order to obtain workers' compensation benefits, and then sue his employer in a civil court, asking that civil court to disregard the previous assertion and the previous finding of workers' compensation coverage. This would create widespread duplicate litigation and increased costs.

2. Section 3(e) of the LHWCA Cannot Be Construed to Justify Ignoring Decisions Under That Act

This Court refers to LHWCA § 3(e) in *Southwest Marine v. Gizoni*[24]. The lower court misread both the function of LHWCA § 3(e) and this Court's reference to it. Section 3(e) only applies to benefits voluntarily paid under the Jones Act, not to those paid pursuant to an order. If there were an order for payment under the Jones Act, there would of necessity be a finding of seaman status by a civil court. Such a finding would terminate any LHWCA rights, and render the credit issue moot. As this Court stated, "an employee who received voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act." . . . "This is so, quite obviously, because the question of coverage has never actually been litigated."[25]

3. Credit for LHWCA Benefits Is an Insufficient Remedy If Employers are Subject to Double Costs.

The Ninth Circuit states that equitable estoppel does not apply. It cites footnote 5 of this Court's *Gizoni* decision for the proposition that where "credit removes the threat of double recovery, the critical element of detrimental reliance does not appear."[26] Neither equitable estoppel nor detrimental reliance are being argued. However, the thought that mere credit is a sufficient remedy

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[24] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

[25] *Gizoni* at 91.

[26] Quoting *Gizoni* at 92, n.5.

for the employer is mistaken. It may prevent double recovery but does not prevent double costs.

There are many remedial schemes that provide compensation to accident victims. Some are based on tort principals, such as the Jones Act. Some are based on no-fault principals, such as automobile insurance in certain states, workers' compensation and the LHWCA. A perfectly efficient remedial scheme, in a macro-economic sense, would deliver benefits to the injured party equal to the costs to the paying party. But no remedial scheme is perfectly efficient. The measure of efficiency is the ratio of benefits over costs.

In 1993, the total workers' compensation benefits delivered in all state and federal workers compensation programs in the United States was 42.9 billion dollars. But the total employer cost of providing workers' compensation was 57.3 billion dollars in the same year.[27] That ratio, or efficiency, is 74.87%. Tort systems were less efficient. In 1991, only 43 cents of every dollar spent on tort lawsuits went to plaintiffs, the balance going to litigation costs and administrative costs.[28] That ratio is 43%.

The argument that credit solves all problems is flawed because it only considers the net benefits received by the employee. It ignores the very substantial employer costs that do not go into the credit calculation. For the

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[27] Schmulowitz, *"Workers' Compensation: Coverage, Benefits and Costs, 1992-93*, Social Security Bulletin, Summer 1995", abstract available at http://www.ssa.gov/statistics/abstracts.html.

[28] Griffin, *"Tort Reform in the U.S. Liability System"*, available at http://www.brobeck.com/docs/meddevic.htm.

employer and for society, serial litigation in dual forums for the same injury is very wasteful. That economic waste averages over one fourth of the total cost of the workers' compensation claim. For the employee, since net recovery in the first case is credited to recovery in the second case, there is no substantial advantage to having litigated the first case.

The result of the decision below is economic waste without any substantial benefit.

4. There Is No Evidence that Seaman Status Was Not Adequately Litigated In the LHWCA Trial

The Appeals Court speculated that the seaman issue was not truly litigated. It does not cite evidence for that conclusion. It ignores the fact that it was Papai, not Harbor Tug who chose to litigate that issue before the ALJ. It ignores the fact that had Harbor Tug prevailed on that issue, there would have been no LHWCA liability. And if the summary dismissal were sustained, Harbor Tug would have escaped liability in both forums. The ALJ Decision and Order shows that the seaman issue was raised and litigated. Speculation as to motive cannot substitute for evidence in the record that the issue was validly litigated.

5. Collateral Estoppel Does Not Encourage Litigation

The Court below opined that allowing collateral estoppel for an LHWCA award would encourage litigation. Its rationale is based on its earlier decision in

Figueroa[29], which held that settlement of an LHWCA claim does not preclude subsequent litigation of a Jones Act claim for the same injury. There are two problems with this approach.

First, it is refusal to honor the first decision that encourages, indeed guarantees, the second litigation.

Second, and more important, *Figueroa* is in error. An order approving an LHWCA settlement has the same force and effect as an order following an LHWCA trial. The Fifth Circuit holds in *Sharp*[30] that an order approving an LHWCA settlement does establish coverage under the LHWCA, and precludes subsequent litigation on the seaman issue. *Sharp* is the better reasoned, and should, at a minimum, be followed in all circuits.

LWHCA § 5 makes LHWCA benefits the exclusive liability of the employer for covered injuries. LHWCA § 33(i) makes LHWCA benefits the exclusive remedy of the employee on account of employer fault. Coverage under the LHWCA is a prerequisite to any LHWCA order, whether approving a settlement, approving stipulations, or following an evidentiary hearing. That is because 'liability' under the LHWCA invokes exclusivity, and any order to pay LHWCA benefits establishes that liability.

It is important to consider that no such order can be engineered surreptitiously by the employer. It must of necessity be sought out by the employee on a claim of

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[29] *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995).

[30] *Sharp v. Johnson Bros. Corp*, 973 F.2d 423 (5th Cir. 1992).

entitlement under the LHWCA. An employee who does not wish an order establishing liability need only either refrain from claiming or withdraw his claim of entitlement.

6. Where Congress Has Expressed Social Policy, it is Not the Proper Function of the Courts to Recast That Policy, But to Apply it.

The Appeals Court characterizes LHWCA benefits as the functional equivalent of maintenance and cure. They are not. LHWCA benefits are more varied, at a higher rate, for a longer duration, and are intended to be a complete system of compensation.

LHWCA medical care is analogous to "cure". And LHWCA temporary total disability is analogous to maintenance. But the LHWCA also provides four classes of benefits foreign to a seaman's maintenance and cure: (i) vocational rehabilitation services[31], (ii) permanent partial disability[32], (iii) permanent total disability[33], and (iv) death benefits[34].

Maintenance is paid at a daily rate, set by contract or custom of the port. This rate rarely exceeded $35 per day. LHWCA weekly compensation is at two thirds of the employee's average earnings[35], up to twice the national

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[31] 33 U.S.C. § 939(c)(2).

[32] 33 U.S.C. § 908.

[33] 33 U.S.C. § 908(a).

[34] 33 U.S.C. § 909.

[35] 33 U.S.C. § 908.

average weekly wage[36]. The current maximum LHWCA weekly compensation rate is $801.06, over three times the maintenance rate. Maintenance ends with maximum medical improvement or return to work. LHWCA permanent disability can continue for life[37].

There is nothing in maintenance and cure jurisprudence suggesting that to be a complete system of compensation for injury. But the LHWCA, at §§ 5(a) and 33(i) plainly states that benefits under that Act are both the exclusive liability of the employer and the exclusive remedy of the employee on account of employer fault.

Where Congress is silent and the statutes do not set forth public policy, courts are empowered to set policy. But where Congress has spoken, and the statute is clear, "sympathy is an insufficient basis for approving a recovery that Congress has not authorized."[38] As this Court explained, it is not the intent of Congress to provide disabled workers with a complete remedy for their industrial injuries.

> While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits of

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[36] 33 U.S.C. § 906(b)(1).

[37] 33 U.S.C. §§ 908(a), (c)(21).

[38] *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs (Cross)*, 449 U.S. 268, 284 (1980).

> potential liability than would have been applicable in common law tort actions for damages.[39]

And as this Court subsequently stated, referring to *Cross*,

> There we recognized that the Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other.[40]

The exclusivity of benefits under the LHWCA was so important that Congress addressed it twice. In § 5(a), the statute provides that benefits under the LHWCA are the exclusive liability of the employer. In § 33(i), the statute provides that benefits under the LHWCA are the exclusive remedies of the employee as a result of employer or fellow employee fault. Yet the appellate court, reasoning that subsequent litigation would allow the largest recovery possible, shunted aside the exclusivity provisions, thereby allowing the very remedies prohibited by §§ 5(a) and 33(i).

Moreover, the appellate court's decision is not good policy. It frustrates the predictability and the finality of decisions. It decreases efficiency without a commensurate increase in benefits. It greatly increases the amount of litigation. It disturbs the delicate balance wrought by Congress between the competing interests of employees and employers. And it creates the potential, which no

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[39] *Ibid.* at 281.

[40] *Morrison-Knudsen v. Director, OWCP (Hilyer)*, 462 U.S. 424, 435 (1993).

doubt all parties would recognize as unpalatable, for an employee to be denied benefits in both forums. For if a civil court is not bound by an LHWCA Decision and Order finding that an employee is not a seaman, there is no logical reason why it must be bound by an LHWCA Decision and Order that a claimant is a seaman. If longshore benefits are denied because the Administrative Law Judge determines that the claimant is a seaman, and a jury subsequently decides that the claimant is not a seaman, he has lost in both forums and recovers nothing for his injury. Injured maritime workers should be entitled to either one or the other remedy, but not both.

B. Seaman Status is Not Portable

The Ninth Circuit, in the opinion below, has, perhaps inadvertently, fashioned a new test for seaman status. This test eviscerates time honored principles of maritime law and should be addressed and reversed by this Court. The new Ninth Circuit test for seaman status no longer requires "an employment related connection to a vessel in navigation." As matters now stand, all that is required is a "prior employment related connection to a vessel in navigation." This expansion of the fleet seaman doctrine to include, within the fleet, vessels owned by prior, different employers has the potential of exposing landlocked employers to Jones Act liability. Further, it moots the "land-based/sea-based"[41] distinction between

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[41] *McDermott International, Inc., v. Wilander*, 498 U.S. 337, 354 (1991).

maritime employees covered under LHWCA and those covered under the Jones Act.

1. The Fleet Must Be Subject to Common Ownership or Control

The fleet seaman doctrine was born in the river trade of the Midwest, where short voyages dictated different operational requirements. Rather than signing articles for year-long voyages, seamen were assigned to different tugs, barges and towboats on an almost daily basis. In order to avoid the harshness of the "more or less permanent connection to a vessel in navigation" test set forth in *Offshore Co. v. Robison*,[42] the Courts fashioned the fleet seaman test to accommodate seamen who owed an allegiance to a fleet of vessels rather than to one particular vessel. See *Guidry v. Continental Oil Co.*[43] and *Barrett v. U.S.A. Chevron, Inc.*[44] However, in each instance, the fleet was under common ownership or control.

Now, for the first time, the Ninth Circuit instructs that plaintiffs' employment with prior employers is relevant to the seaman status test. The fleet has been redefined to include all the vessels owned by all the different employers that hire workers from the employee's union. This leads to the conclusion that, unless a new employment situation amounts to a permanent change of status, the seaman carries his seaman

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[42] 266 F.2d 769, (5th Cir. 1959).

[43] 640 F.2d 523 (5th Cir. 1981).

[44] 781 F.2d 1067 (5th Cir. 1986) (en banc).

status on his back from job to job, regardless of the nature of work performed for the new employer.

Around the turn of the century, employers and employees bargained away certain rights in order to bring about workers' compensation regimes in most states. Among the rights bargained away was the employees' right to sue the employer for damages for work-related bodily injury. In return, employers agreed to compensate employees for work-related injuries, regardless of fault. The decision of the Ninth Circuit in this case undermines the very core of this bargain, by restoring the right to sue to certain employees. This new group of favored employees are those who were once seamen and who continue to work out of the same union.

Under this new 'fleet seaman' test, there is no requirement that the employee have a work-related connection to a vessel in his current employment or, for that matter, be injured afloat. For example, under the Ninth Circuit analysis, Mr. Papai would still be eligible for seaman status if he had been employed by a subcontractor hired by Harbor Tug & Barge Co. to paint PT. BARROW. To continue the example, if the painting subcontractor hires day workers out of Mr. Papai's union, Mr. Papai would be covered under the Jones Act. The painting subcontractor need not own or control a single vessel, for, under the new Ninth Circuit rule, it would be deemed to have some undefined form of ownership or control of the various vessels belonging to the other employers that hire out of the same union. Land-based employers will face sea-based exposures.

This land-based/sea-based distinction becomes especially problematic when confronting claims made by construction workers. Certain trades, like pile drivers and equipment operators, work sometimes on derrick barges and sometimes on land. The expanded fleet presents employers with the very real possibility that they may have seamen on the payroll if their pile drivers or crane operators had worked in waterfront construction for prior employers. Even when the current employer is, for example, building a freeway in the middle of California's central valley. All that is required is that both the prior and current employer hire from the same union. Employment that is purely land-based would now arguably come under the Jones Act.

2. A Seaman's Work Must Be Sea-Based, With Exposure to the Perils of the Sea.

It is a time honored principle of maritime law that seamen are entitled to the "special protection of the courts."[45] As noted in *Wilander*, "traditional seamen's remedies . . . have been universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and disadvantages to which they who go down to the sea are subjected."[46] It is the sea-based employees who go down to the sea and who are subject to the attendant perils.

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[45] *Harden v. Gordon*, F. Cas. No. 6047 (1823, CC Me.) (Story, J.).

[46] 498 U.S. 337, 350 (*quoting Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1991) (Stone, C.J., dissenting)).

The land-based/sea-based distinction was the demarcation line adopted in *Wilander*. It was followed in *Latsis*. But it was jettisoned by the court below. *Wilander* and *Latsis* focused on the land-based/sea-based distinction in current employment. In *Latsis*, the appeal was taken from the Second Circuit Jones Act Status jury instruction, as follows: "The test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be satisfied where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[47]

The *Latsis* Court granted certiorari on the following question: "What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act?"[48] The Court then answered the question as follows "the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its nature and duration."[49]

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[47] *Latsis*, at 2182.

[48] *Latsis*, at 2181.

[49] *Latsis*, at 2194.

When the instruction is updated with the holding in *Latsis*, only parts (2) and (3) are effected. The requirement that plaintiff's employment involve regular exposure to the hazards of the sea is unaffected. Rather, as noted by Justice Stevens in his concurring opinion,[50] the majority opinion in *Latsis* narrows the scope of Jones Act coverage. The unwarranted expansion of the fleet seaman doctrine by the Court below eviscerates the very issue that this Court addressed in *Latsis*. If prior employment, with different employers, is the standard by which Jones Act status is judged, then there can be no requirement that current employment with the alleged Jones Act employer, involve or concern exposure to the "hazards of the sea." It need not even be sea-based. Seaman status would travel to land-locked employment. There is no justifiable reason for such an extension of Admiralty jurisdiction.

The Court below has crafted a new standard, which, simply put, is "once a seaman, always a seaman." This new standard guts the doctrine of LHWCA – Jones Act mutual exclusivity. If not reversed, it will burden an already beleaguered industry. American shipowners and all waterfront employers will, of necessity, buy multiple insurance coverages for their entire work force, out of fear that an employee's work history will take them into uncovered waters. This is not the intent of either remedial scheme. It does not need a further burden to employment. Nor does it deserve increased liability exposure.

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[50] *Latsis*, at 2197 (joined by Thomas and Breyer).

IV. CONCLUSION

The Ninth Circuit, with its opinion below, has undone an important distinction between the LHWCA and the Jones Act, a distinction carefully drawn by this Court in several recent opinions. Under the rubric of no double recovery, it pays mere lip service to the doctrine of mutual exclusivity. Then it further degrades the process by expanding Jones Act coverage to land-based employees. It has taken a no-fault compensation system, the LHWCA, and necessarily turned it into a highly litigious forum where employers must necessarily fight every step of the way. It has burdened the system with additional overhead without additional benefit. For the reasons set forth above, this Court should reverse the Court below with instruction to reinstate the findings of the trial court based on application of the exclusive remedy provisions of the LHWCA, or, at a minimum, application of collateral estoppel. Lastly, this Court should reverse or vacate that portion of the opinion below that extends the fleet seaman doctrine to include vessels not owned or controlled by the current Jones Act employer.

Dated: November 12, 1996

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APPENDIX A – RELEVANT STATUTES

5 U.S.C. § 554 – Adjudication

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had

for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not –

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except

as witness or counsel in public proceedings. This subsection does not apply –

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

33 U.S.C. § 902 – Definitions

When used in this chapter –

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 903 – Coverage

. . .

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 (relating to recovery for

injury to or death of seamen) shall be credited against any liability imposed by this chapter.

33 U.S.C. § 905 – Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. § 906 – Compensation

. . .

(b) Maximum rate of compensation

(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

33 U.S.C. § 908 – Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly

wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the

elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subsection, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subsection shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66⅔ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section, if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity

the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

. . .

(i)(1) Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this chapter. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both.

Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

. . .

33 U.S.C. § 909 – Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed $66^{2}/_{3}$ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving

the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed $66^2/_3$ per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than $66^2/_3$ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between $66^2/_3$ per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but –

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of

the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 919 – Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

. . .

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 933 – Compensation for injuries where third persons are liable

. . .

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 939 – Administration by Secretary

. . .

(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

46 U.S.C. § 688 – Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of

such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.
